Michigan on June 24, 2002, heard an NST challenge similar to IPANY's. That case involved a complaint by the Pay Telephone Association of Michigan against the payphone rates charged by Michigan Bell, on the ground those rates did not comply with the New Services Test. The PSC had previously upheld Michigan Bell's rates, and the payphone association appealed. The mid-level appellate court affirmed the PSC, based on state law, on October 23, 2001 - after issuance of the Wisconsin CCB Order but before issuance of the Wisconsin Commission Order. Michigan Pay Tel Assn. v. Michigan Public Serv. Comm., 2001 WL 1277446. On further appeal to the Michigan Supreme Court, rather than hear the appeal, the Supreme Court vacated the lower court decision, and remanded the PSC's approval of the Michigan Bell rates back to the Michigan PSC "for reconsideration in light of" the FCC's Wisconsin Commission Order. See, Michigan Pay Telephone Association v. Michigan Public Service Commission, et al., 646 N.W.2d 471, Sup. Ct. of Michigan, June 24, 2002. That is precisely the result which should have been applied in New York.

Consistent with the Michigan Supreme Court decision, this Commission has also determined remands should be ordered for state decisions made before issuance of the Wisconsin Commission Order, so that the Order could be applied by state agencies which had previously failed to do so. See In the Matter of North Carolina Payphone Association Petition for Declaratory Ruling, CCB/CPD 99-27, Order, DA 02-513, March

5, 2002.[19]

The failure of the PSC, and the New York courts, to apply the Wisconsin Commission Order was unreasonable, capricious, and inconsistent with governing law. Accordingly, those determinations should, as occurred in North Carolina and Michigan, be set aside.

POINT B: The RBOC Coalition Letters Of April 10 and 11, 1997, As Codified In The Refund Order, Require Verizon To Be Liable For Refunds Back To April 15, 1997

As discussed at the outset, the RBOCs, including Verizon, reached an agreement with the Commission which would grant more time for the RBOCs to file NST-compliant state tariffs, and also allow the RBOCs to immediately begin receiving dial-around compensation. In return, the RBOCs pledged - and were obligated by law - to examine their existing state tariffs and to file corrections when necessary.

The RBOCs pledged that "all the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all of the basic payphone lines and unbundled features and functions required by the Commission's Order". Critically, they also pledged as follows:

"Where new or revised tariffs are required and the new tariff

---

[19] The North Carolina Order dealt with complaints by payphone associations in three states (North Carolina, Oklahoma, and Michigan), that the state commissions had not, in decisions rendered before issuance of the Wisconsin Commission Order, properly applied the New Services Test. After issuance of the Wisconsin Commission Order, this Commission remanded the state decisions in North Carolina and Michigan for further proceedings to be consistent with the Wisconsin Commission Order. The Oklahoma decision, which was directed at non-RBOC ILECs was allowed to stand because the NST (and thus the Wisconsin Orders) was held to apply only to RBOCs.

> rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services *under the existing tariffs*".

RBOC Coalition Letter of April 11, 1997, page 1. (Ex A). (emphasis added).

The promise by the RBOCs to pay refunds, where revisions to state tariffs were required, is not ambiguous.

Pursuant to the benefits of the Refund Order, Verizon has enjoyed dial-around compensation for more than seven years. But as to the burdens, that is another story. Rather than comply with its duties, Verizon has refused to file NST-compliant rates in New York, and has tried to wiggle its way out of honoring its commitment - and the duty imposed by the Refund Order - to give refunds to IPPs in New York.

In one of the more inventive acts of bootstrapping ever witnessed, Verizon asserts that since it did not allegedly make the required tariff filing during the forty-five day grace period, it never "took advantage" of the waiver, and thus the refund obligation never applied. That argument is both factually wrong and without merit.

As discussed earlier, contrary to its claim, Verizon did in fact take advantage of the waiver granted in the Refund Order by (a) waiting until May 19 to file tariff changes, and (b) filing revisions to its intrastate tariffs on that date, revisions which Verizon asserted were made pursuant to the Bureau Waiver Order and the Refund Order, as necessary to bring the state rates into compliance with the New Services Test.

However, just because Verizon filed some tariff revisions does not mean it complied with its legal duties, and the pre-requisite established to receipt of dial-around compensation. Verizon's obligation was to (1) review all existing state tariffs and correctly identify those which were not NST-compliant and (2) refile any non-NST-compliant rates so that they would, in fact, be NST-compliant. By claiming wrongly that its pre-existing state tariffs were NST-compliant, and by not filing revised tariffs, Verizon never fulfilled its obligation under the Refund Order, and it remains liable for refunds until the PSC - or this Commission - properly approves rates which comply with the NST. Alternatively, since Verizon did not fulfill the pre-requisite to receiving dial-around compensation, and receipt of the dial-around was conditional, any and all dial-around received by Verizon since April 15, 1997, should be refunded.

Critical to this is that Verizon's commitment, as specifically set forth in the April 11, 1997, RBOC Coalition letter, was to file new tariffs where required, and that if such required rates were lower than the pre-existing rates, to give refunds.

In New York, Verizon was required to file revisions to the tariffs for the PAL line, usage, and features, because the pre-existing rates never complied with the NST.

Moreover, even if Verizon hadn't filed any revisions to its intrastate tariffs by May 19th, (even though required by Commission orders), it would still be liable for refunds. The language of the trial court on this subject is directly on point:

"The Court further finds that the terms of the April 10, 1997

[RBOC] letter and the April 15, 1997 [FCC] Order did not require that Verizon actually revise its tariffs in order to subject it to the requirement of issuing refunds or credits, but that Verizon was required to issue refunds or credits if it was eventually determined that it <u>should have</u> reduced its tariffs". (Emphasis in original).[20]

Under Verizon's theory, an RBOC which complied with its obligations under federal law, properly evaluated its pre-existing tariffs, determined the tariffs did not meet the NST standards, and responsibly filed replacement tariffs by May 19, would be liable for refunds. In contrast, according to Verizon, a recalcitrant RBOC, fully recognizing that its pre-existing tariffs did not meet the NST standard, but arrogantly refusing to file an appropriate tariff which met the required standards, would be immunized from making any refunds. Such an argument is totally without merit.

Verizon's theory was summarily rejected by the New York trial court:

> "<u>The interpretation urged by Verizon</u> would have the result that, so long as Verizon properly identified those pre-existing rates which required modification in order to comply with the new services test and made such modification by May 19, 1997, purchasers would be entitled to refunds to the extent that the modified rates were lower than the pre-existing rates. However, in the event that Verizon did not properly identify those pre-existing rates which required modification - intentionally or unintentionally - no refunds would be due even if the PSC (or the Court) ultimately determined that the

[20] New York Supreme Court Order of July 31, 2002, (Ex G) at page 21.

> pre-existing rates failed to comply with the new services test, and therefore, **should have been** modified by May 19, 1997. Stated otherwise, Verizon would be rewarded for failing to properly identify those pre-existing rates which did not comply with federal law. This interpretation is illogical. Furthermore, the language pointed to by Verizon actually supports the interpretation adopted by this Court that refunds would be due at such time as new tariffs in compliance with the new services test actually took effect". (Emphasis partly in original and partly added).[21]

The purpose of the Refund Order was not to reward recalcitrant RBOCs, like Verizon, which ignored their obligations and refused to file replacement tariffs meeting the NST standards. To the contrary, the purpose of the Refund Order was to assure that RBOCs would be penalized if they failed to promptly replace non-compliant tariffs, and to assure IPPs would not be harmed or prejudiced by any delay in the filing of necessary replacement tariffs.

To hold that Verizon's flagrant disregard for this Commission's requirements, and its unambiguous commitment to file NST-compliant tariffs, now protects Verizon from making any refunds, would wholly undercut the regulatory program established by this Commission under Section 276, and the rights of IPP competitors.

Verizon is also incorrect in asserting that the "limited" waiver granted to the RBOCs limits Verizon's refund liabilities solely to the 45 day waiver period.

---

[21] New York Supreme Court decision on rehearing, April 22, 2003, (Ex H) at page 7.

The Commission's language stating that the "waiver...is for a limited duration" had nothing to do with limiting the period for which Verizon would be liable for refunds. Instead, the "limited duration" referred only to the brief extension, until May 19, 1997, to file correct tariffs. After that date, pre-existing rates not in conformance with the New Services Test would be deemed in violation of federal law.

The "limited waiver" granted in the April 15, 1997, Refund Order extended the time for the RBOCs to file NST compliant intra-state tariffs. The FCC had previously, in the Bureau Waiver Order issued on April 4, 1997, granted a similar "limited waiver" extending the time for the RBOCs to file NST compliant interstate tariffs. That April 4th "limited waiver" had nothing whatsoever to do with refunds, or with any "window" during which refunds might be available.

The April 10, 1997 RBOC Coalition letter requested the same waiver for intrastate tariffs which had been granted in the Bureau Waiver Order for interstate tariffs:

> "We propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4 Order to file new intra-state tariffs, in those states and for those services where new tariffs are required."

The RBOCs never asked this Commission to limit the timeframe during which a refund liability would exist, and the Commission never approved such a limit. Accordingly, the "limited waiver" granted by the Commission in the April 15, 1997, Refund Order had the same purpose as the "limited waiver" in the Commission's April 4, 1997 Waiver Order. It merely extended the deadline to file NST-compliant tariffs for a short period of time, and in no way established any "limited period" during which refunds would be required.

The New York trial court agreed:

> Verizon argues that, even if it is assumed that the Order was intended to provide for refunds of rates that were not changed during the waiver period, the relief provided by the April 15, 1997 Order was only applicable for a very limited period of time. For example, the Order provides that it was "granting a limited waiver of brief duration" and that "the states must act on the tariffs filed pursuant to this Order within a reasonable period of time". However, this language merely applies to the limited time that Verizon was given to file revised tariffs to comply with the new services test and to the time given to the states to act on the tariffs filed, not to the period for which refunds must be given. In addition, petitioners should not be penalized by failure of the state to act in a timely manner if, in fact, there was undue delay in the review process.

New York Supreme Court decision on rehearing, April 11, 2003 (Ex H) at pp. 7-8.

To hold that Verizon's maximum possible liability was for forty-five days, which is only the blink of an eye in regulatory time, regardless of Verizon's deliberate and continuing violation of federal law, would be wholly inconsistent with the clear language and intent of the RBOC Coalition letters and the Refund Order.

Finally, issuance of the Wisconsin CCB Order and the Wisconsin Commission Order did not create new rules or new duties for Verizon and the BOCs. Those duties already existed on April 15, 1997. Instead, the Wisconsin CCB Order and the Wisconsin Commission Order were, and were intended solely to be, merely interpretive of the Payphone Orders, the Computer III Orders, and the New Services Test.

There are two types of rules: "Legislative Rules and Interpretative Rules". NYC Employees Ret. Sys. v. SEC, 45 F.3d 7 at 12 (CA-2, 1995). Interpretative rules "do not create rights, but merely 'clarify an existing statute or regulation'". Ibid.

An interpretative rule simply states "what the administrative agency thinks the statute means, and only 'reminds affected parties of existing duties.'" General Motors Corporation v. Ruckelshaus, 742 F.2d 1561 at 1565, citing Citizens to Save Spencer County, 600 F.2d at 876. (emphasis added).

As the Third Circuit Court of Appeals has stated:

> "Interpretive rules constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. Interpretive rules are not intended to alter legal rights, but to state the agency's view of what existing law requires. Such rules 'merely clarify or explain existing law or regulations.'"

Appalachian States Low-Level Radioactive Waste Commission v. O'Leary, 93 F.3d 103 at 112.

"Interpretive rules are statements as to what the administrative agency or officer thinks the statute or regulation means, a clarification or explanation of existing laws or regulations rather than a substantive modification of existing regulations or an adoption of new regulations...such rules only remind affected parties of existing duties..." 2 Am Jur 2d, Administrative Law, Section 161 Interpretive Rules; Agency Definitions.

Here, the Wisconsin CCB Order and the Wisconsin Commission Order did not change any existing rights and obligations. Those rights and obligations - including the duty to file NST compliant rates based on Computer III principles, i.e., use of forward looking, direct costs with reasonable overheads - existed on April 15, 1997, and were neither enlarged nor changed by the Commission's interpretive orders.

By the end of 1996, and certainly before April 15, 1997, Verizon and other Bell companies knew full well what was expected of them under the Payphone Orders. Notwithstanding their professed "confusion", the methodology for setting NST rates was well known to them.

As this Commission itself has already found, the Wisconsin CCB Order and the Wisconsin Commission Order were merely interpretative,[22] and added no new duties to Verizon's obligation as of April 15, 1997 to establish forward looking, direct cost rates in conformance with the New Services Test.[23] As emphasized in the Bureau Waiver Order and the Refund Order, the Commission fully intended those duties to take effect on

---

[22] "An agency's conclusion that its order is interpretative 'in itself is entitled to a significant degree of credence'". Viacom v. FCC, 672 F.2d 1034 at 1042 (CA-2, 1982).

[23] At page 10, FN 73 of the Wisconsin Commission Order, this Commission rejects the RBOC claim the Wisconsin CCB Order was a "legislative rule", thus establishing it had to be an interpretative rule. NYC Employees Retirement Sys. v. FCC, 45 F3d 7 at 12. (supra).

April 15, 1997. And in judging whether Verizon complied with the requirements of those orders, the holdings of the two interpretative Wisconsin Orders are fully applicable as of April 15, 1997.

* * * * * *

POINT C: Requiring Verizon To Give Refunds Will Not Constitute Unlawful Retroactive Ratemaking

Verizon argues that requiring it to honor its commitment in the RBOC Coalition letters, and the obligation set forth in the Refund Order, would constitute retroactive ratemaking and violate the Filed Tariff Doctrine. That is not true.

Because Verizon's rates have not complied with the New Services Test since April 15, 1997, they have neither been lawful nor legal.

The fact they had been on file for many years does not mean they were lawful as of April 15, 1997, the date the NST requirement became effective. Those rates were, by definition, unjust and unreasonable - and therefore unlawful - as of that date. That made them fully subject to refund under binding federal law.

In this regard, IPANY adopts, and incorporates by reference herein, the legal arguments for mandating refunds, based on the U.S. Supreme Court decisions in Arizona Grocery Co. v. Atchison Top. & SF. Railway, 284 US 370, 52 S. Ct. 183, and Maislin Industries v. Primary Steel, 497 US 116, 110 S. Ct. 2759, set forth in the pending petitions filed by the Illinois Public Telecommunications Association and the Southern Public Communications Association in this Docket.

Next, the RBOCs specifically waived any objection to giving refunds in the April 10, 1997, RBOC Coalition Letter. Therein, with respect to their pledge to give refunds back to April 15, 1997, in the event that the correct NST rates were lower than pre-existing rates, the Coalition stated as follows:

> "(I should note that the Filed-Rate Doctrine precludes either the state or federal government from ordering such retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance."

Third, even absent such a waiver, the Filed Tariff Doctrine would not preclude refunds back to April 15, 1997. That is because this Commission's Refund Order specifically established the refund obligation as of that date. When a regulatory agency issues an order subjecting rates to possible refunds, any amounts collected by the utility after the effective date of that order are, as a matter of law, conditional, and if shown to have been improper, such rates may be refunded in accordance with the terms of the regulatory order.

Finally, no credence can be given to the claim that issuance of the two Wisconsin Orders subjected the RBOCs, and Verizon, to unlawful retroactive ratemaking.

As discussed earlier, the Wisconsin Orders were merely interpretative orders, and did not create "new law". Commission interpretative orders are not unlawfully retroactive:

> In addition, the question of retroactivity does not arise in an FCC ruling that is merely interpretive. See *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 135, 56 S.Ct. 397, 80 L.Ed. 528 (1936) (explaining that agency ruling interpreting statute "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand"); *Farmers Telephone Co., Inc. v. Federal Communications Commission*, 184 F.3d 1241, 1250 (10th Cir. 1999); *McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986) ("An interpretive rule ... clarifies or explains existing law or regulations."); *Borden, Inc. v. National Labor Relations Board*, 19 F.3d 502, 510 (10th Cir. 1994) (holding that there are no retroactivity concerns when agency's ruling does not "overrule[ ] a controlling precedent upon which [petitioner] relied to its detriment"). (emphasis added).

Wisconsin Bell, Inc. v. Bie, 216 F. Supp. 2d 873 at 878.

IV. PRE-EMPTION OF THE NEW YORK RULINGS IS CONSISTENT WITH, AND REQUIRED BY, STATUTE AND PRECEDENT

Because the New York decisions stand in direct conflict with the orders of this Commission, and severely undercut the national policy established by Congress in the Telecom Act, the New York determinations must be pre-empted.

This Commission has already made clear, in the Payphone Orders, that state actions inconsistent with the Commission's NST requirements will be pre-empted. See First Payphone Order, para. 147:

> "Accordingly, we conclude that Computer III tariff

> procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers. Pursuant to section 276(c), any inconsistent state requirements with regard to this matter are preempted".

See also Payphone Reconsideration Order, para. 218:

> "We have addressed such preemption of state requirements with regard to jurisdictionally-mixed enhanced services in Computer III. We adopt that analysis for preemption of state payphone service non-structural safeguards that are inconsistent with the Report and Order".

And, of course, §276 independently requires such pre-emption.

The Commission has not hesitated to pre-empt other state actions which conflict with the Commission's Orders implementing §276. For example, in Matter of New England Public Communications Council Petition for Pre-emption, FCC 96-470, CCB Pol 96-11, December 10, 1996, the Commission set aside a regulatory order of the Connecticut DPUC under the Supremacy Clause and §276:

> [T]he Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is

outright or actual conflict between federal and state law...or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress... [A] federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. As noted above, section 276 of the Communications Act directs the Commission to prescribe regulations to implement several statutory provisions regarding payphone services. Significantly, section 276(c) states: "To the extent that any State requirements are *inconsistent with the Commission's regulations, the* Commission's regulations on such matters shall preempt such State requirements"...

Thus, in section 276 Congress clearly expressed its intent that the Commission's rules regarding payphone services preempt inconsistent state regulations...

We conclude that the DPUC Decision, on its face, is inconsistent with the terms, tenor and purpose of section 276 and our implementing rules, and therefore is preempted...

The DPUC Decision is flatly at odds with the regulatory scheme we established in the Pay Telephone Order pursuant to section 276...Therefore, consistent with the intent of Congress expressed in section 276(c), we conclude that the DPUC Decision is preempted by our Pay Telephone Order"...[24]

When this Commission exercises the power of preemption, it does not matter whether the state determination being reviewed was issued by a Public Service Commission or by a court reviewing the determination of a Public Service Commission. Section 276(c) states that "to the extent any state requirements are inconsistent with the

[24] New England Public Communications Council, Docket 96-11, FCC 96-470, December 10, 1996, supra, at para 26-29, *internal footnotes omitted*..

Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements". (Emphasis added). The state requirements at issue here were initially established by the PSC, and then upheld by the New York reviewing courts. Together they constitute a state "requirement", and to the extent that such requirement is inconsistent with the Commission's regulations (which is clearly what has happened in New York), those requirements are to be, and in fact are, pre-empted.[25]

Thus, in this Commission's March 5, 2002, Order in connection with the North Carolina Payphone Association Petition for a Declaratory Ruling, this Commission set aside the decision of the North Carolina Utility Commission which conflicted with the Wisconsin Commission Order, notwithstanding the fact the North Carolina courts had been involved in reviewing the decision of the NCUC.

V. CONCLUSION

As this Commission found, in paragraph 3 of the Wisconsin Commission Order, "Payphones are an important part of the nation's telecommunications system. They are critical not only for emergency communications, but also for those Americans who cannot afford their own telephone service. Thus, despite evidence that payphones are losing market share to wireless services, the basic pay telephone remains a vital

[25] The power of pre-emption under the Supremacy Clause does not extend solely to state administrative actions. Instead, pre-emption power extends to any provision of state law, whether created judicially or administratively, to the extent it conflicts with Congressional policy or national regulatory policy established by this Commission pursuant to Congressional authorization.

telecommunications link for many Americans".

The promotion of competition among payphone service providers, and the promotion of widespread deployment of payphone service to the benefit of the general public is a national goal codified by Congress in Section 276 of the Telecom Act. This Commission has repeatedly held that furtherance of that Congressional policy, and assuring the continued viability of the pay telephone industry, requires that RBOC rates for underlying payphone services be priced according to the New Services Test. To the extent that a state refuses to follow that policy, and this Commission's specific directives implementing that policy, the state action should and must be pre-empted.

For the reasons set forth herein, this Commission should pre-empt the determinations of the State of New York inconsistent with this Commission's Payphone Orders and the two Wisconsin Orders, and should grant such other and further relief as it deems just and proper. This includes setting aside New York determinations which (a) refuse to apply the holdings of the Commission's Wisconsin Orders; (b) refuse to require Verizon to establish forward-looking, direct cost rates for payphone services in accordance with the New Services Test; and (c) refuse to comply with this Commission's requirements that Verizon be liable for refunds because its payphone rates have continuously exceeded NST-compliant rates since April 15, 1997.

Respectfully submitted,

Independent Payphone Association of
of New York, Inc.
By: Keith J. Roland
Its Attorney
Roland, Fogel, Koblenz &
Petroccione, LLP
One Columbia Place
Albany, New York 12207
(518) 434-8112

Dated: Albany, New York
December 29, 2004

ORIGINAL

CERTIFICATE OF SERVICE

I, Tonia Margiotta, do hereby certify that I have this day caused to be mailed by U.S. Mail, postage prepaid a true and correct copy of the Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-emption and Declaratory Ruling addressed to the following:

RECEIVED

DEC 2 9 2004

Federal Communications Commission
Office of Secretary

Hon. Jaclyn Brilling
Secretary
New York State Public
Service Commission
Three Empire State Plaza
Albany, New York 12223

Sandra D. Thorn, Esq.
General Counsel
Verizon New York Inc.
1095 Avenue of the Americas
Room 3745
New York, New York 10036

Robert P. Wise, Esq.
Wise, Carter, Child & Caraway, P.A.
401 East Capitol Street - Suite 600
P.O. Box 651
Jackson, Mississippi 39205

Allison Fry, Esq.
Mississippi Public Service Commission
2nd Floor, Woolfolk State Office Building
Jackson, Mississippi 39201

Thomas B. Alexander, Esq.
General Counsel - Mississippi
BellSouth Telecommunications, Inc.
175 E. Capitol Street
Suite 790, Landmark Center
Jackson, Mississippi 39201

John C. Henegan, Esq.
Butler, Snow, O'Mara, Stevens
& Cannada, PLLC
17th Floor, AmSouth Plaza
P.O. Box 22567
Jackson, Mississippi 39225-2567

Meredith E. Mays, Esq.
BellSouth Telecommunications, Inc.
Suite 4300
675 W. Peachtree Street, N.E.
Atlanta, Georgia 30375

Jon Stover
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5A-365
445 12th Street, SW
Washington, D.C. 20554
jon.stover@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Albert H. Kramer, Esq.
Robert F. Aldrich, Esq.
Dickstein, Shapiro, Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
Counsel for American Public Communications Council

Michael W. Ward, Esq.
Illinois Public Telecommunications Association
1608 Barclay Boulevard
Buffalo Grove, Illinois 60089

Paul C. Besozzi, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
Counsel for New England Public Communications Council, Inc.

Aaron M. Panner, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for BellSouth Telecommunications, Inc.,
SBC Communications, Inc. and the Verizon telephone companies

David S. Tobin, Esq.
Tobin & Reyes, P.A.
7521 West Palmetto Park Road
Suite 205
Boca Raton, Florida 33433
Counsel for Florida Public Telecommunications Association, Inc.

Brooks E. Harlow, Esq.
David L. Rice, Esq.
Miller Mash LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101
Counsel for Northwest Public Communications Counsel

Craig D. Joyce, Esq.
Walters & Joyce
2015 York Street
Denver, Colorado 80205
Counsel for Colorado Payphone Association

Gregory Ludvigsen, Esq.
Ludvigsen's Law Offices
1360 University Avenue, West
St. Paul, Minnesota 55104-4086
Counsel for Minnesota Independent Payphone Association

Matthew L. Harvey
Christine F. Ericson
Deputy Solicitor General
John P. Kelliher
Solicitor General
Special Assistant Attorneys General
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, Illinois 60601

Howard Meister
President
Payphone Association of Ohio
1785 East 45th Street
Cleveland, Ohio 44103

I also certify that on this date I have sent a true and correct copy of said Petition electronically (without exhibits) to the following:

Best Copy and Printing, Inc.
Portals II
445 12th Street SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Jon Stover
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5A-365
445 12th Street, SW
Washington, D.C. 20554
jon.stover@fcc.gov

Dated: December 29, 2004

Tonia Margiotta

Tonia Margiotta
Secretary to Keith J. Roland
Roland, Fogel, Koblenz &
Petroccione, LLP
One Columbia Place
Albany, New York 12207
(518) 434-8112

EXHIBIT A

A5691-524 S April 14 ord

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

April 10, 1997

Ex Parte Filing

Mary Beth Richards
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be too low to meet the "new services" test and will therefore have to be raised.

In order to allow deregulation to move forward and ensure that LEC PSPs are able to compete on a level playing field starting, as planned, on April 15, 1997, we propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4th Order to file new intrastate tariffs, in those States and for those services where new tariffs are required. Each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised.

Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. Moreover, we will not seek additional reimbursement to the extent that tariff rates are raised as a result of applying the "new services" test.)

The LECs thus ask the Commission to waive the requirement that effective intrastate payphone tariffs meet the "new services test," subject to three conditions: (1) LECs must file a written ex parte with the Commission by April 15, 1997, in which they attempt to identify any potentially non-compliant state tariff rates; (2) where a LEC's state tariff rate does not comply with the "new services" test, the LEC must file a new state tariff rate that does comply within 45 days of the April 4, 1997 Order, and (3) in the event a LEC files a new tariff rate to comply with the "new services" test pursuant to this waiver, and the new tariff rate is lower than the previous tariff rate as a result of applying the "new services" test, the LEC will undertake